SUPPLEMENTAL BRIEF

MOTION FILED
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No. 83-1944 (9)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HOLLY JENSEN, Director and WILLIAM J. EDWARDS, Deputy Director, Department of Motor Vehicles, State of Nebraska,

Petitioners,

—v.—

FRANCES J. QUARING,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF OF RESPONDENT

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No. 83-1944

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

HOLLY JENSEN, Director and WILLIAM J. EDWARDS, Deputy Director, Department of Motor Vehicles, States of Nebraska,

Petitioners,

- v. -

FRANCES J. QUARING,

Respondent.

MOTION FOR LEAVE TO FILE
SUPPLEMENTAL BRIEF

COMES NOW Frances J. Quaring, the above-names Respondent, by and through her attorney of record, and hereby moves the Court for an Order granting her leave to file a supplemental brief in the above-captioned matter.

In support of this Motion, the Respondent states to the Court as follows:

1. That since the oral argument and submission of the instant case on January 7, 1985, certain intervening matters have arisen which the Respondent believes are relevant to the Court's disposition of this matter.

2. That the above-mentioned intervening matters are set forth in detail in the Supplemental Brief of Respondent attached hereto for filing.

3. That this Motion is submitted pursuant to Rule 35.5 and in conformance with the Court's recent statement in Board of License Commissioners of the Town of Tiverton v. Pastore, 53 L.W. 4057, 4058 (1985), that "[Counsel] have a continuing duty to inform the Court of any development which may conceivably affect the outcome of the litigation."

WHEREFORE, Respondent Frances J. Quaring respectfully prays for an Order of the Court granting her leave to file the attached

Supplemental Brief of Respondent.

FRANCES J. QUARING,
Respondent

Respectfully submitted,

By: Thomas C. Lansworth

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STATEMENT OF THE CASE

The facts of this case and the issues litigated have been fully stated by the parties in their respective briefs on the merits; the purpose of this supplemental brief is to bring to the Court's attention recent developments which "may conceivably affect the outcome", Fusari v. Steinberg, 416 US 379, 391 (1975). This case concerns the denial by the State of Nebraska and its officials of the Respondent's application for a valid Nebraska motor vehicle operator's license. Respondent, Mrs. Frances J. Quaring, was refused a driver's license because of her exercise of religious beliefs which do not allow her to submit herself to being photographed. She asserts that the actions of the Petitioners violate her right to freely exercise her religion as guaranteed to her by the First Amendment.

Following filing of briefs on the merits, this case was argued to the Court and submitted for decision on January 7, 1985. Subsequent to the submission of the case, the Nebraska Legislature has considered proposed legislation which would repeal the statutory requirement of driver's license photographs which gave rise to this dispute.

In connection with the Nebraska Legislature's consideration of an elimination of the photograph requirement, Petitioner Holly Jensen and Robert Kerrey, Governor of the State of Nebraska, stated their support for this legislative proposal in testimony before a committee of the Legislature on February 1, 1985. The Nebraska Legislature remains in session as of this filing.

A transcript of the full testimony of the Petitioner and others before the Nebraska Legislature's Public Works Committee has been lodged with the Clerk. Pertinent portions of that testimony are quoted in the Argument which follows.

ARGUMENT AND CONCLUSION

THE CONSIDERATION OF LEGISLATION REPEALING THE PHOTOGRAPHIC REQUIREMENT FOR NEBRASKA DRIVER'S LICENSES IS A DEVELOPMENT WHICH COULD MOOT THE INSTANT CASE OR CONCEIVABLY AFFECT THE OUTCOME OF THE LITIGATION.

As noted in the Statement of the Case, the Nebraska Legislature is currently considering a proposal which eliminates the statutory requirement of a photograph on Nebraska driver's licenses. In connection with that legislative proposal, Petitioner Holly Jensen and the Governor of Nebraska both testified in support of the proposal before a legislative committee. Both officials stated that the driver's license photograph is not necessary either to identify licensed drivers or to achieve law enforcement interests of the State of Nebraska.

Specifically, Petitioner Holly Jensen, in testimony before the Public Works

Committee, stated as follows:

> Mr. Chairman and members of the Committee, my name is Holly Jensen and I'm Director of the Department of Motor Vehicles. I'm here today to testify in favor of LB 332. LB 332 eliminates the color photograph on driver's licenses.
>
> * * *
>
> When I reviewed necessary expenses with my staff during the budgetary process, I found that about the only area that wasn't absolutely necessary was requiring the photograph on driver's licenses. It's my feeling that the age, eye color, height and weight are enough to verify that that is the person holding the license.
>
> * * *
>
> [T]he fact is that there has been some false applications by individuals requesting duplicate driver's licenses but withh someone elses' identification....
>
> * * *
>
> A driver's license with a photograph does not provide more validity to that driver's license. The license is only as good as the identification presented at the time of application, regardless of picture or no picture.

LB 332, Hearing before the Public Works Committee, Nebraska Legislature, February 1, 1985, statement of Holly Jensen, pp. 78-80.

See also id. at 87-88 (stating that the requirement "in driver licensing accomplishes nothing" and that "its my understanding that the reason why it was originally passed was from ... because the merchants wanted it ... for checks, bars ... etcetera.")

Similarly, Governor Kerrey, urging the repeal of the photograph requirement to reduce state expenditures, testified that "it's not something that would interfere with law enforcement and I don't believe that it would interfere with merchants either." Id. at 74. See also id. at 77 ("a change that I think would not damage our ability to enforce our laws or ability to provide free and open commerce for our merchants.")

The statements of Petitioner Holly Jensen and Governor Kerrey quoted above are irreconcilable with the position taken by the Petitioners before this Court in the instant case. The Petitioners have asserted that the

driver's license photographhh is absolutely necessary to achieve claimed compelling state interests in identification and law enforcement. Brief of Petitioners, p. 21.

At the present time, it is the understanding of the Respondent that the proposal to eliminate the driver's license photograph requirement has been held in the Public Works Committee and has not advanced to the floor of the Nebraska Legislature. However, the current session of the Nebraska Legislature continues to meet and the license photograph legislation is subject to being voted to the floor for full consideration at any time. It also is possible that the Legislature may choose to address the license photograph question within the context of its debate on the state budget.

In a recent statement regarding developments occurring subsequent to argument

of a case, this Court said:

> [Counsel] have a "continuing duty to inform the Court of any development which may conceivably affect the outcome" of the litigation. Fusari v. Steinberg, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring). When a development after this Court grant certiorari or notes probable jurisdiction could have the effect of depriving the Court of jurisdiction due to the absence of a continuing case or controversy, that development should be called to the attention of the Court without delay.

Board of License Commissioners of the Town of Tiverton v. Pastore, 53 U.S.L.W. 4057, 4058 (1985).

The continuing contingency of the legislative repeal of the Nebraska driver's license photograph requirement and Petitioner Holly Jensen's official support for such repeal, as well as that of the Nebraska Governor, are developments subsequent to the oral argument of this case which conceivably could affect the outcome of this litigation. The Respondent brings these

developments to the attention of the Court for consideration in connection with the Court's deliberation on the issues presented by the parties in their briefs on the merits and at argument.

Respectfully submitted,

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April, 1985

SUPPLEMENTAL BRIEF

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF OF PETITIONERS

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MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

COME NOW the Petitioners, pursuant to Rules 35.5 and 35.6, and hereby request leave of the Court to file a Supplemental Brief in the instant matter.

In support of said Motion, Petitioners state as follows:

1. That Respondent herein has requested leave of Court to file a Supplemental Brief, and copies of the same have been served upon Petitioners.

2. That the facts and arguments set forth by Respondent are inaccurate and misleading.

3. That in the interests of justice, Petitioners should be allowed to clarify the facts and law as exist at the present time.

WHEREFORE, Petitioners respectfully request leave of the Court to file the attached Supplemental Brief.

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STATEMENT OF THE CASE

The factual issues and arguments in this case have been fully set forth by the parties in their respective briefs and in oral argument before this Court on January 7, 1985. Respondent has subsequently sought to file a Supplemental Brief asserting that recent developments may moot the instant case or affect the outcome of the litigation.

The primary issue before this Court is whether or not Nebraska's statutory requirement of a photograph on a driver's license constitutes a burden upon the Respondent's free exercise of religion. The basis for the Respondent's suggestion to the Court that the instant matter may be moot relates to certain testimony before a legislative committee.

ARGUMENT

Testimony Before A Legislative Committee Does Not Constitute A Change As To Fact Or Law So As To Suggest That The Instant Matter Is Moot Or That Such Testimony Could Affect The Outcome Of This Litigation.

Respondent asserts that testimony by Holly Jensen, Director of the Nebraska Department of Motor Vehicles, and by Governor Robert Kerrey, in support of a bill to eliminate the photograph requirement on driver's licenses may cause the instant action to become moot. Respondent asserts that "The Nebraska Legislature is currently considering a proposal which eliminates the statutory re-

quirement of a photograph on Nebraska driver's licenses." Respondent's Supplemental Brief, Page 3. However it should be noted that on February 12, 1985, the proposed legislation was killed in committee pursuant to Section 17 of the Rules of the Nebraska Unicameral:

> Sec. 17. *Indefinitely Postponed Bills.* If the committee action on a bill be to postpone indefinitely, the bill shall stand indefinitely postponed; except that such bill may be placed on General File or referred back to the committee by a three-fifths vote of the elected members upon motion made within three legislative days after the committee makes its report to the Legislature, or by a two-thirds vote of the elected members upon motion made more than three legislative days after such committee report. Not more than one bill shall be raised from committee on any one motion. A motion to raise cannot be amended to include any other bill or subject matter. A motion to raise must be disposed of by the Legislature within five legislative days after the motion is available for consideration or it shall be deemed defeated.

As of May 2, 1985, no further action has been taken on LB 332, the legislative bill in question. The Nebraska Legislature is tentatively scheduled to adjourn on May 31, 1985. The likelihood that said bill will be placed on General File is remote.

Petitioners acknowledge that all parties have an obligation to inform the Court of any developments which may affect the outcome of the instant litigation. *Fusari v. Steinberg,* 419 U.S. 379 (1975). This case was relied upon by Petitioners in their Supplemental Brief, but is clearly distinguishable from the instant factual situation. In *Fusari,* the Connecticut Legislature enacted major revisions and amendments to the statutes at issue. Because

of those significant changes, this Court concluded that "We are unable meaningfully to assess the issues in this appeal on the present record." 419 U.S. at 387.

Respondent's reliance on *Board of License Commissioners of the Town of Tiverton v. Pastore,* 105 S.Ct. 685 (1985) is similarly flawed. In *Tiverton,* certiorari was granted to decide whether the Fourth Amendment exclusionary rule applies in civil liquor license revocation hearings. However, during the pendency of that action, the liquor establishment in question had gone out of business. Consequently, the writ of certiorari was dismissed as moot.

In disposing of the instant matter, "[a]nd in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered." *Ashcraft v. Tennessee,* 322 U.S. 143 at 156 (1944). There has been no change as to the factual basis of the instant matter, nor has there been any change in the applicable statutory requirement of a photograph on a driver's license. The personal opinions expressed by Ms. Jensen, as Director of the Nebraska Department of Motor Vehicles, and by Governor Robert Kerrey, in no way obviate the Petitioners' obligation to enforce the statute at issue and in effect at the present time.

CONCLUSION

For the foregoing reasons, Petitioners respectfully submit that there is no suggestion of mootness in the instant action, and that the matter is appropriately before this Court for a decision on the merits.

Respectfully submitted,

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